Iowa Judges Association Presentation to
Digital Audio Recording Technology Committee
July 31, 2009
By Hon. Robert J. Blink, District Court Judge

Introduction

Mr. Chairman, Madam Chairwoman, members of the DART Committee, on behalf of the Iowa Judges Association, thank you for this opportunity to share our thoughts on the difficult and contentious issue of examining the feasibility of replacing certified court reporters with digital recording equipment.

The Iowa Judges Association represents the trial judges of this state: District Judges, District Associate Judges, and Juvenile and Probate Judges. There are 180 of us in the association, give or take. Each of us has served the public on the bench, on average, more than 13 years. We speak with a voice of more than two thousand years of experience of making record in the trial courts of this state. With due respect to this committee, and our Supreme Court, our association is the greatest repository of practical knowledge on the issue before us.

The trial judges of Iowa oppose the substitution of certified court reporters with digital recording equipment. We have surveyed our membership. Virtually all of those polled share this view. We would suggest that an opinion based on more than two millennia of experience, day by day, hour by hour, litigant by litigant, is a weighty precedent.

In 1964, Mr. Justice William O. Douglas of the United States Supreme Court penned these words: "[C]ounsel must be provided with the tools of an advocate . . . [T]he most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy. . . . [W]e conclude the unavailability of a complete transcript in this case entitles [the litigant] to a new hearing." The Iowa Supreme Court adopted this opinion in *In Re Interest of T.V.*[1] In that case, because of a deficient record below, the Court had to order the matter retried.

The trial record is the foundation of the common law. No appellate court, including the Iowa Supreme Court, can fulfill its constitutional function of interpreting the law outside the context of the record made below. An indispensable participant in the creation of that record is the certified court reporter.

There are three basic reasons why the trial judges believe replacing certified court reporters with digital recording equipment is unwise: accuracy, cost and precedent.

[1] 563 N.W.2d 612 (Iowa 1997).

Accuracy

The certified court reporter is the "gold standard." The best technology presently available cannot stop the record and ask for repetition or clarification when someone coughs, sneezes, a siren blares, a witness mumbles, speaks with a speech impediment, uses street slang, talks with an accent, or two people speak at once. Our judicial system is constructed of bricks of words, which once lost as "inaudible" can never be recovered. Families, finances and freedom more often than not rest on a single word. They are captured and saved best by a human professionally trained to preserve them contemporaneously with the speech. The accuracy of a record imbues it with integrity. Adequacy and accuracy is not the same thing. Were it your family, your finances, your freedom at stake, which mode of record keeping would you demand? The public we serve deserves no less.

Beyond the physical skills of capturing every syllable spoken, certified court reporters have training in law, medicine, finance and composition. They understand foundations, evidentiary and procedural litanies and can assist a harried judge on his or her twenty-third hearing of the day who may have overlooked part of a required colloquy. It is a time-tested team approach to saving the record that the Supreme Court must have.

Not only does the accurate record provide a tool for the advocate and the indispensable facts for the Supreme Court, it protects the trial judge. A person who

has never presided over trial court matters cannot appreciate to what extent the "record" shields that trial judge from unwarranted ethical claims, particularly from self-represented litigants who often misinterpret legal procedure for unfair treatment. To ask a trial judge to constantly put their professional stature at the mercy of digital recording equipment is not acceptable.

It is impossible to predict when such a problem will arise. The extra set of trained ears and eyes of the reporter are critical to the defense of such claims. Only a person wizened by years on the trial bench can truly appreciate how quickly this type of problem can develop. Only an accurate record stands between that judge and the judicial qualifications committee.

As your committee contemplates the practicability of increasing the use of digital recording, we would note that the vast majority of courtrooms in this state predate World War I, many predate the Spanish American War. The physical construct of those rooms did not contemplate air-conditioning. They are majestic but acoustically cavernous, with high ceilings and marbled walls. An inexpensive "one-size-fits-all" digital recording system that will accommodate each of these courtrooms simply does not exist. A certified court reporter can make a clean record in every one, and they have been doing so for decades.

It is paradoxical that a system that prides itself on accuracy, clarity and specificity now seems so willing to sacrifice the people who so carefully guard

those components. As a matter of evidence, the Supreme Court routinely demands audible recordings of confessions taken by police and pretrial depositions of expert witnesses and rightfully strips those statements from the record if they are not accurate or audible; and within the recent past has required that all portions of a trial be reported, absent waiver of the parties. Why should we accept a trial record any less reliable?

There is no persuasive evidence that digital recording assures a real-time record as accurate as that created by a certified court reporter.

Cost Effectiveness

Based on the presentations made to this committee by the vendors invited to speak, the cost per courtroom ranged from $8,000 to $50,000 for the equipment alone. This does not include the annual maintenance fee of approximately 12% of the purchase price, equipment replacement costs, the wages and benefits to be paid to the electronic monitor and the cost of preparation of the actual transcript.

There are approximately 315 courtrooms in this state. Using the quotes for equipment alone of $8,000 to $50,000 per courtroom, that totals between two and one-half million dollars and nearly sixteen million dollars. Clearly the Judicial Branch is not prepared to expend even a fraction of those sums. And to do less compromises the very integrity of the system.

We are deeply concerned that this issue is driven by financial panic at the peril of quality. When we hear well-intentioned technology personnel opine that multiple courtrooms around the state could be "monitored" from a central "control room" in Des Moines, we are aghast at this complete lack of understanding of how a real trial courtroom operates. We know it is functionally impractical for a trial judge in a fluid legal proceeding to be subject to "control room" personnel, unschooled in the law, somewhere in the bowels of the Supreme Court Building.

Justice is not a cheap concept and should not be treated that way in its application. We find little solace in the suggestion by one court administrator that she has purchased "very simple single-track recorders" to preserve record in juvenile proceedings when they "do not have reporter coverage." While this might provide marginal recording of two-party small claims cases, which is already mandated, this does not address any of the concerns about record preservation in cases of greater substance; and is wholly inconsistent with the multi-party litigation that is manifest in juvenile court proceedings. It is also far less sophisticated than the most rudimentary system offered by the vendors who presented to this committee. We understand "very simple single-track recorders" to be a euphemism for "cut rate." This is exactly the type of "bargain basement" record that trial judges abhor: four parties, four lawyers, and multiple witnesses all speaking over each other on one track without the ability to distinguish speakers or have

contemporaneous correction of speech problems. Contested Juvenile court proceedings are among the most difficult courtroom proceedings to manage and preserve. This type of minimal "record making" is also inapposite to our Chief Justice's cause ce'le'bre: protection of the children.

The most electronically sophisticated courtroom now incorporated into the Iowa judicial system is the courtroom at the Drake Law School Legal Clinic. It provides both audio and video recordation. More than $100,000 has been invested in this system. It is a single-track system. Thirteen Polk County cases have been tried in that courtroom as part of the Trial Practicum Program. I daresay that none of the judges who presided over those trials would have acquiesced to have the record rest on the electronic recording. If you will permit me personal anecdotal comment, I have presided over two of those trials and have taught in that courtroom as a professor since its creation (and the one before that as well over 28 years). There are frequent and significant gaps in the audio portion of the recording because of movement of the lawyers, soft speech and the ubiquitous human cough/sneeze/mumble/talk-at-the-same-time problem.[2]

The lesson here is that expensive equipment alone does not "fix" the problem with the record – the certified court reporter does.

[2] See Professor Rigg's memo concerning the difficulties with the Drake Legal Clinic electronic recording system.

Failure to provide an accurate record implicates ancillary costs: retrial due to a deficient record or the loss of federal funding for our juvenile courts if the record does not comport with nationally imposed guidelines.[3] Indeed, the Children's Justice Advisory Committee to our Supreme Court recommends that all contested juvenile proceedings be reported by a certified court reporter.

Will electronic equipment be immune from future budget reductions? No. And if court administration follows the cheap-is-best philosophy, we will start with inadequate equipment without funds to repair or replace it when necessary.

Precedent

Every lawyer knows that the bedrock of our profession is "stare decisis:" let the decision stand. We constantly build our "field of fairness," the new law, by reliance on what has worked before in other courts and avoiding that which has not. The precedent with regard to digital recording of legal proceedings militates against its use in all but a limited number of situations.

The debate about replacing court reporters has been raging for decades. It has not been fostered by trial lawyers or trial judges, but by well-meaning administrators or others who have never practiced in a courtroom, never presided over hearings or trials and whose knowledge base is hearsay. All the empirical data presented to this committee demonstrates that digital recording equipment has

[3] See Judge Alan Allbee's memo concerning federal funding implications.

replaced certified court reporters not because of cost, not because of accuracy, but because the jurisdictions who have adopted this technology did not have an adequate number of available certified court reporters. They settled for second best because they could not get the "gold standard."

It is axiomatic that redundant recording and storage is a lynchpin to success of the systems proposed by the vendors. Having reviewed all the information presented to this committee, we observe several critical questions that have not been asked or answered, and they are technical in nature. Can our present network accommodate our existing load and the increased burden of the anticipated monitoring, recording and storage? Secondly, can our network handle both EDMS, the extant load and the increased burden generated by the redundancy requirements of digital recording? If not, the question of "feasibility" is moot from the beginning.

The records made from the extant recording devices in our small claims courts are routinely of abysmal quality. We note that Ms. Davis of the Executive Branch will be speaking on behalf of the ALJs. Our members provide the appellate review of the records made in those administrative hearings. The records generated using certified court reporters, in workman's compensation cases for example, are clear and accurate. Those made with electronic recording devices, primarily

unemployment cases are poor and commonly deficient in comparison. That, of course is not due to the ALJ, but the manner of recording.

We have contacted the local Bankruptcy Court. They utilize electronic recording only in the most routine non-contested matters; everything else requires a certified court reporter.

I have received correspondence from reporters in jurisdictions that are using digital recording. Many lawyers are hiring court reporters to make an "unofficial record" of the proceedings which is more accurate than the digital recording. This leads to the inevitable problem of the "have and the have-nots," those who have money get a better record.

Court reporters who have been hired to transcribe digitally recorded proceedings find that it often takes three times longer to prepare the transcript because of difficulty identifying speakers or discerning words because those problems were not addressed in real time when the matter was heard. Once lost, the words are gone forever. Oregon has experienced substantial delays in preparation of transcripts from digital recording.

Persons working as electronic monitors of multiple courtrooms note that this multi-tasking of confirming recordation and indexing proceedings is so distracting that often problems with recording are overlooked. And to ask the judge to be the

electronic monitor demeans the office and distracts him or her from their appointed duties.

The historical development of the certified court reporter system in Iowa has, in large part, maintained the efficiency of a trial judge's work, particularly in rural districts. Not only does the court reporter preserve the record, he or she also functions as an executive assistant and paralegal in addition to numerous ministerial functions. Clearly, an electronic machine could not fulfill these tasks and a purely clerical staff member unfamiliar with legal proceedings or, more importantly, the nuances of how trial lawyers and judges interact would not suffice.[4]

Recommendations

The trial judges of this state understand the conundrum facing this committee. We know your obligation is to report to the Supreme Court. But we also know your greatest duty is to serve the interest of the Iowans that pass through all our courtrooms every day. We appreciate that you seek our thoughts as to how to make our judicial system work better. Firing court reporters and throwing CDs at the problem is not the solution. The key is efficiency.

[4] See Judge Dave Christensen's memo concerning the myriad tasks of the rural court reporter.

First, the necessity for a certified court reported record increases with the gravity and complexity of the issues presented, the number and nature of the parties and counsel involved in the proceeding and the probability of appeal.

Second, only the trial judge knows when such a record should be made, and the discretion to do so should be greater in courts of general jurisdiction than those of limited jurisdiction. The determination of a court reported record versus an electronically recorded record must be made on a case-by-case basis.

Many of the proceedings before District Associate Judges have record made "on paper." Such procedures should become uniform around the state. We are already electronically recording magistrates' proceedings.

Court Administrators must increase their timely communication with trial judges to "block schedule" proceedings that either do not require a record, or can be electronically recorded or made of record on paper. This is far more problematic for rural districts as compared to metropolitan areas because the unexpected record can be easily covered by a reporter "stationed" in a courthouse. The same is not true with a judge stranded in a courtroom two hours from the nearest court reporter.

Simply stated, it is our belief that categorical, nondiscretionary imposition of digital recording of legal proceedings beyond the magistrate jurisdiction will be less efficient, not more so.

The trial judges recognize that "paper records" and hopefully EDMS may increase efficiency. And some believe that certain uncontested, routine matters of lesser gravamen with fewer participants could be electronically recorded. But not one judge in our association's survey wants to commit to a judicial system without certified court reporters.

Is it feasible to digitally record some perfunctory legal proceedings with little prospect of appeal? Yes, we already do that in magistrates' court and make paper records in district associate court. Is it practical to do it beyond that? Not likely, unless we are all willing to accept a judicial system of a quality less than what Iowans have come to expect.

To our members, court reporters are indispensible to our efficient administration of justice. We stand willing to help in this financial crisis with any reasonable remedies. If, however, this committee should recommend substitution of certified court reporters with digital recording equipment, over our advice and counsel, we request that any committee created to implement such a transition have a significant number of Iowa trial judges among its members.

If time permits, I will be glad to entertain any questions.